IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL APPEAL NO. 23 OF 2003.

John Mohammad Makroo,
Central Jail, Aguada. ... Appellant.

Versus

State of Goa represented
by Officer-in-Charge,
Calangute Police Station,
Calangute. ... Respondent.

Mr. J.P. D'Souza with Ms. C. Collasso, Advocates for the Appellant.

Mr. S.N. Sardessai, Public Prosecutor for the Respondent/State.

Coram : P.V. HARDAS, J.

Date : 5th September 2003.

ORAL JUDGMENT.

The appellant/accused, who is convicted by the Special Judge, N.D.P.S. Court, Mapusa, by Judgment, dated 20th February 2003, in Special Criminal Case No. 11 of 2001, for an offence punishable under Section 20(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act and sentenced to undergo rigorous imprisonment for 10 years and to pay fine of Rs. 1 lakh in default, simple imprisonment for one year, has filed the present appeal challenging his conviction and sentence.

2. The facts in brief as are necessary for the decision of the appeal are set out hereunder:-

P.W.5 P.S.I Rajesh Kumar was working at the Calangute Police Station as Assistant Sub-Inspector. On 14th December 2000, at 9.05 a.m., he received specific and reliable information that a person aged about 25 years, strong built, six feet tall, wearing white striped full sleeve shirt and grey colour pant was going to come to Charlston Hotel, Cobrawaddo, Calangute, for delivering a consignment of charas to his customers. The said information was reduced into writing and a copy of the said information was forwarded to P.W.6 Dy.S.P. Arvind Gawas. A copy of the said information is at Exhibit 30. Thereafter, presence of two panch witnesses, namely, P.W.3 Kavinash Harmalkar and P.W.4 Bhanudas Pednekar was secured. The raiding party consisted of P.W.5 P.S.I. Kumar, the panch witnesses, P.W.6 Dy.S.P. Gawas, Police Inspector D.S. Banaulikar and police constables. The members of the raiding party and the panchas had been informed about the specific and reliable information received by P.W.5 P.S.I. Kumar. The raiding party, thereafter, left for Charlston Hotel, Cobrawaddo, Calangute, in a police jeep at about 9.45 a.m.. One constable was carrying the kit box containing weighing, packing and sealing material while Police Inspector Banaulikar carried with him the seal of Calangute Police Station. On reaching Cobrawaddo, Calangute, the jeep was parked at a distance of 200 metres from the hotel and the members of the raiding

party alighted from the jeep and took their positions in the nearby bushes. At about 10.15 hrs. they saw one person, whose description matched with the description received earlier, walking towards the hotel. The said person was carrying a pink colour polythene bag. As soon as he reached near the hotel, the members of the raiding party rushed towards him and surrounded him. P.W.5 P.S.I. Kumar thereafter identified himself to the said person and asked the name of the said person, who disclosed his name as John Mohammad Makroo. P.W.5 P.S.I. Kumar also introduced P.W.6. Dy.S.P. Gawas and the other members of the raiding party including the panchas. The said person during the trial has been identified as the appellant/accused. P.W.5 P.S.I. Kumar then informed him about the reliable information which he had received and had also informed him that he had a right of being searched either before a Magistrate or a Gazetted Officer. The accused declined the said offer. The accused was also informed that he had a right to search the members of the raiding party, which he also declined. Thereafter, the personal search of the accused was taken. In his right front pant pocket cash of Rs. 650/- was found and a laminated card of House Boat Owner's Association bearing the photograph of the accused. The cash and the laminated card were then put in an envelope, packed and sealed, which was signed by P.W.5. P.S.I. Kumar, the panchas and the accused.

Thereafter, a search of the pink colour polythene bag of the accused was undertaken. The bag contained yellowish black colour substances in different sizes and shapes and after observing the said substances minutely, P.W.5 P.S.I. Kumar disclosed to the raiding party that the substances were charas. The said substances were then weighed and found to weigh 6 kilograms. The said substances were tied with a jute string and put in a jute sack, which was tied and sealed in the similar manner. The particulars were then written on a piece of paper, which was pasted on the jute sack, which bore the signature of P.W.5 P.S.I. Kumar, panchas and the accused. Since the accused did not possess any documents, he was arrested after informing the grounds of his arrest. The panchanama of the entire sequence was drawn and the same is at Exhibit 18. The seizure report is at Exhibit 19. After returning to the police station, P.W.5 P.S.I. Kumar filed the complaint at Exhibit 24. Intimation under Section 57 of the N.D.P.S. Act is at Exhibit 25.

3. P.W.7 Umesh Shet received three sealed parcels from P.W.5 P.S.I. Kumar on 14th December 2000. He made an entry in the muddemal register and kept the sealed parcels in safe custody. The property was entered in the muddemal register at Entry No. 39/2000. The property was received by P.W.2 P.S.I. Krishna

Shetgaonkar in the Office of the C.I.D. Crime Branch, Panaji, on 15th December 2000, from Police Constable Umesh Shet Buckle No. 4203, of Calangute Police Station. Exhibit 9 is the covering letter which bears the endorsement of the receipt of the property signed by P.W.2 P.S.I. Shetgaonkar. On receipt of the property, the property was kept in a cupboard under lock and key and on the same day the property was forwarded to the Office of the Director of Food and Drugs Administration, Panaji. P.W.1 Mahesh Kaissare examined the seized property and by his report, at Exhibit 7, opined that the property examined by him tested positive for charas.

4. After completion of the investigation, a charge-sheet against the appellant/accused came to be filed. The learned Special Judge, N.D.P.S. Court, vide Exhibit 4, framed a charge against the appellant/accused for an offence punishable under Section 20(b)(ii) of the N.D.P.S. Act. The appellant/accused denied his guilt and claimed to be tried. The prosecution in support of its case examined 7 witnesses.

5. The learned Special Judge accepting the prosecution evidence, convicted and sentenced the appellant/accused as aforestated.

6. Mr. D'Souza, the learned counsel appearing on

behalf of the appellant, has urged (1) that the report of the Chemical Analyser P.W.1 Kaissare, at Exhibit 7, does not refer to the fact that before analysing the substances, P.W.1 Kaissare had compared the seal with the specimen seal letter at Exhibit 6 Colly. In fact, P.W.1 Kaissare has admitted in the cross-examination that only 3 seals were intact and 2 seals were missing and the seals on the jute sack were not clear and, as such, he was unable to say what was the writing on the seals and (2) According to the prosecution, the property which is alleged to have been deposited with P.W.7 Umesh was carried to the C.I.D. Office by P.W.7 Umesh whereas, according to P.W.7 Umesh, the said property was handed over to P.W.5 P.S.I. Kumar, on 15th December 2000, for onward transmission to the C.I.D. Office. Thus, according to Mr. D'Souza, the learned counsel appearing on behalf of the appellant/accused, there is absence of satisfactory evidence in respect of transmission of the property to the Chemical Analyser and, in fact, the prosecution has not established that the property, which was seized from the accused, was the same property which was forwarded to the Chemical Analyser.

7. Mr. Sardessai, the learned Public Prosecutor, has submitted that obviously P.W.7 Umesh has made a mistake in stating that the property was handed over by

him to P.W.5 P.S.I. Kumar for onward transmission as the document at Exhibit 9 clearly demonstrates that it was P.W.7 Umesh who had carried the property.

8. In view of the limited challenge which is raised on behalf of the appellant/accused, it is not necessary for me to advert to the evidence of the other witnesses. Suffice it to say that P.W.5 P.S.I Kumar has not stated about the handing over of the seized property to anyone. Police Inspector Banaulikar, who was a member of the raiding party, to whom, in the normal course, the drugs ought to have been handed over, has not been examined as a witness. P.W.5 P.S.I. Kumar, either in his examination-in-chief or in his cross-examination, has not stated anything about the deposit of the property in the police station. P.W.6 Dy.S.P. Gawas, who has been examined by the prosecution, has also not stated with whom the property was deposited. In the cross-examination he has admitted that he does not recall how many seals were affixed on the seized articles. He also does not recall if any specimen seal was taken at the spot.

9. P.W.7 Umesh states that he had received the sealed parcels from P.W.5 P.S.I. Kumar and had made an entry in the muddemal register. The muddemal register was produced during the recording of evidence of this

witness and a xerox copy of entry no. 39/2000 is at Exhibit 35. P.W.7 Umesh has stated that on the next morning, that is, on 15th December 2000, he had handed over the parcel to P.W.5 P.S.I. Kumar to be sent to the Chemical Analyser through SP, CID Crime Branch, Panaji and who has made the necessary acknowledgment on the register. The said acknowledgment is marked by the learned trial Court at point 'A' and it bears a signature, which has been identified by P.W.7 Umesh as that of P.W.5 P.S.I. Kumar. The said entry reads:- "Property at Sr. No. 1 handed over to I.O. Shri Rajesh Kumar to send the same to Chemical Analyser through SP (CID) Panaji".

10. It is, thus, clear that, according to P.W.2 P.S.I. Shetgaonkar, the property which he had forwarded for analysis was received from P.W.7 Police Constable Umesh. P.W.5 P.S.I. Kumar does not state as to who was the carrier of the property to the CID Office. P.W.7 Police Constable Umesh states that, on 15th December 2000, he had handed over the property to P.W.5 P.S.I. Kumar for onward transmission to the Chemical Analyser through CID Crime Branch. It is extremely unfortunate that in a serious case of this nature, where 6 kilograms of charas have been alleged to have been seized by the police officers, the prosecution seems to have shown a high degree of laxity in proving its case. The

prosecution has not been vigilant when the evidence of the witnesses has been recorded. Before the recording of the evidence of P.W.7, the prosecution had examined P.W.2 P.S.I. Shetgaonkar, who has proved his endorsement at Exhibit 9 that he had received the property from P.W.7 Umesh. Contrary to the prosecution evidence, P.W.7 Umesh has deposed and has proved that the property was in fact handed over by him to P.W.5 P.S.I. Kumar. The prosecution has, thus, examined two sets of conflicting witnesses, whose evidence conflicts with each other. The discrepancy which has occurred on account of the evidence of these two witnesses is irreconcilable. If the evidence of P.W.2 P.S.I. Shetgaonkar is to be accepted that he received the property from P.W.7 Police Constable Umesh, the evidence of P.W.7 Umesh and the endorsement on the muddemal register that he had handed over the property to P.W.5 P.S.I. Kumar is irreconcilable. The truth and falsehood in this case is inextricably entwined that it is difficult to separate the grain from the chaff and if such an exercise is undertaken, all that remains is husk. From the evidence, according to me, it is apparent that the property that P.W.2 P.S.I. Shetgaonkar received was not the property that was seized in the present crime as the property in the present crime had been handed over by P.W.7 Umesh and which is borne out from Exhibit 35 for onward

transmission to P.W.5 P.S.I. Kumar. P.W.5 P.S.I. Kumar does not state that he had carried and deposited the property with P.W.2 P.S.I. Shetgaonkar. P.W.7 Umesh does not state that the property relating to this case had been deposited by him with P.W.2 P.S.I. Shetgaonkar. There is no evidence establishing the continuity link with the property that was seized and the property analysed.

11. In the result, therefore, according to me, no nexus is established between the property that was seized and the property that was analysed. In the background of this, according to me, the appellant/accused is entitled to be given the benefit of doubt. It is unfortunate that the prosecution has created this serious discrepancy, which cannot be termed as an irregularity and overlooked by the Court. Because of this discrepancy, the appellant/accused is entitled to be given the benefit of doubt, despite the allegations of the prosecution that 6 kilograms of charas were recovered.

12. In view of this, the Criminal Appeal is allowed. The Judgment and Order of the Special Judge, N.D.P.S. Court, Mapusa, dated 20th February 2003, in Special Criminal Case No. 11 of 2001, is, hereby quashed and set aside and the appellant/accused is

acquitted of the offences for which he was charged and convicted. The appellant/accused be released forthwith, if not wanted in any other case. Fine, if paid, be refunded to the appellant.

(P.V. HARDAS)
JUDGE.

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